

Status of Selected Delta-related Litigation and Proceedings (as of April 19, 2007)

A. SWP Pumping/OCAP—State and Federal Endangered Species Acts

1. **SWP Pumping**: On April 18, 2007, Alameda County Superior Court Judge Frank Roesch made final his March 22, 2007, Proposed Order issuing a writ of mandate against the state Department of Water Resources (DWR) in a case brought by Watershed Enforcers challenging DWR's incidental take authority under the California Endangered Species Act (CESA) for operation of the State Water Project (SWP) Pumping facilities.

DWR had asserted that, pursuant to a “patchwork” of relevant agreements with DFG in place prior and up to 1997, it had the requisite take authority pursuant to a statutory “grandfathering” provision added to CESA in 1997. The judge disagreed.

The writ orders DWR to cease and desist from further operation of the SWP Pumping facilities within 60 days from the date of entry of judgment until and unless they have obtained appropriate CESA incidental take authorization for spring and winter run Chinook salmon and Delta smelt from the Department of Fish and Game.

DWR has indicated that it will appeal the ruling. In the meantime, it has applied--as an alternative means of CESA compliance--for a determination from DFG that existing federal authorizations for SWP operations under the so-called OCAP biological opinions (see below regarding separate challenges to those opinions) are consistent with CESA. The Director of DFG has until May 9th, 30 days from the date of application, to make his determination in this regard.

2. **OCAP**: There are currently pending in federal district court in Fresno, two cases challenging the validity, under the federal Endangered Species Act, of biological opinions issued by federal fisheries agencies covering the ongoing, joint operating criteria and plan (OCAP) for the Bureau of Reclamation's Central Valley Project and DWR's State Water Project.

Each of the biological opinions—the first, covering Delta smelt, issued in February 2005 by the U.S. Fish & Wildlife Service; the second, covering salmon and steelhead, issued in October 2004 by the National Marine Fisheries Service—had concluded that, with the incorporation of certain mitigation measures, operating the CVP and SWP as described in the OCAP would not jeopardize the existence of the relevant listed fish species.

The coalition of environmental organizations that brought suit alleged, among other things, that the opinions failed to consider the best available science with regard to declining fish populations, and that they had relied on uncertain mitigation measures as a basis for reaching their “no jeopardy” conclusions.

Subsequent to the initiation of these lawsuits, Reclamation reinitiated consultation with the federal fisheries agencies on both of the biological opinions, citing new scientific information, and stated that new biological opinions would be completed in 2008. Reclamation (joined by DWR as an intervening party) petitioned the court to dismiss, or in the alternative, stay the lawsuits in light of the reinitiated consultation. These motions were unsuccessful, and a hearing on cross-motions for summary judgment in the Delta Smelt case is scheduled for April 26, 2007.

A fundamental issue in these pending lawsuits concerns the method of operating the CVP and SWP in the interim period (approximately 2 years) that it will take to complete new biological opinions. Plaintiffs would like a decision on the validity of the original biological opinions as promptly as possible, to guide operations during the interim and the preparation of new opinions. Defendants, on the other hand, would like to be permitted to continue operating under the old opinions during the interim, while the new opinions are being prepared.

B. CALFED Record of Decision—CEQA/NEPA

1. **State Coordinated CEQA Cases:** These coordinated CEQA challenges to the CALFED Record of Decision (ROD), originally brought in 2000 by the Farm Bureau, the Regional Council of Rural Counties, and the South and Central Delta Water Agencies, are currently pending before the California Supreme Court. Review was granted on January 25, 2006 (from an appellate court decision in October 2005), and the parties are waiting for an oral argument date.

Issues on appeal are whether the CEQA documents underlying the ROD:

- (i) Should have analyzed an alternative that would reduce exports of water from the Delta.
- (ii) Adequately discussed sources of water for environmental purposes and relevant impacts; and
- (iii) Contained sufficient detail about the Environmental Water Account.

2. **Federal NEPA Case:** This NEPA challenge to the ROD was filed by the Farm Bureau and several individual farmers in 2000. The case—which involves many of the same issues as the state coordinated CEQA cases-- is currently pending in federal district court in Fresno. In June 2006, a joint status report was filed by the parties requesting that the proceedings be deferred pending the outcome of the California Supreme Court litigation.

C. Delta Land Use/Development---CEQA/Delta Protection Act

1. **River Islands Project**: On August 18, 2006, several environmental groups brought suit in Sacramento Superior Court, challenging the state Reclamation Board's approval of fill and encroachment permits for the River Islands Project, an 11,000-unit housing development near Lathrop. The suit alleges that the Reclamation Board, as a responsible agency under CEQA, should have prepared a supplemental EIR for the project, and that it violated its own regulations. One issue is whether the Reclamation Board should have analyzed greater flood risks associated with global warming, climate change and a potential rise in sea levels.

The case is fully-briefed and scheduled for argument on April 27, 2007.

2. **Old Sugar Mill Project**: On February 22, 2007, the Delta Protection Commission (DPC) made a final determination that the Clarksburg Old Sugar Mill Specific Plan and related documents, as approved by the Yolo County Board of Supervisors on October 24, 2006, are not consistent with three policies in the DPC's Resource Management Plan for the "Primary Zone" of the Delta and related provisions of the Delta Protection Act. The decision was based on interrelated concerns about levees, new residential development, and potential conflicts with existing agricultural use.

As required by the Delta Protection Act, the DPC remanded the matter back to Yolo County.

3. **East Cypress Corridor Project**: In April 2006, an environmental group filed a lawsuit in Contra Costa County Superior Court against the City of Oakley over plans to build more than 4,000 new homes on more than 2,000 acres of previously unincorporated land. In January 2007, the judge issued a tentative ruling in favor of the city on levee and flood issues, but against it on air quality issues. The judge has recently requested supplemental briefing by May 3, 2007; a final decision is expected 90 days thereafter.